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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

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No. 76-1408

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RON PAUL, *Petitioner*,  
v.  
ROBERT ALTON GAMMAGE, *Respondent*.

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On Petition for a Writ of Certiorari to the  
Supreme Court of Texas

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**BRIEF FOR RESPONDENT IN OPPOSITION**

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May 13, 1977

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**JURISDICTION**

The petition should be dismissed for lack of jurisdiction because the decision of the Supreme Court of Texas is supported by an independent and adequate non-federal ground. See discussion *infra*, at pp. 3-5.

**STATEMENT OF THE CASE**

Respondent, Gammage, won the general election on November 2, 1976 for congressman from the 22nd District of Texas in an admittedly close race. Peti-

tioner, Paul, the challenger, thereafter instituted three separate efforts to unseat Gammage. First, petitioner requested and obtained a full recount of all of the votes pursuant to the recount provisions of the Texas Election Code, Art. 7.14, Sec. 19 (for voting machines); Art. 7.15 Subd. 23 (for electronic voting systems); and Art. 9.38a (for paper ballots). Petition, pp. 33a-39a, 43a-52a. The recount was conducted under the general observation of inspectors from the Secretary of State of Texas (the chief election officer of the state)<sup>1</sup> and bi-partisan counsel from the Privileges and Elections Subcommittee of the House Administration Committee. The result was that respondent was confirmed as the winner of the election by a margin of 268 votes and on November 22, 1976 respondent was issued a certificate of election from the Secretary of State. Respondent was duly sworn in as a member of the 95th Congress on January 4, 1977.

Second, petitioner instituted an election contest suit in the state district court of Harris County, Texas pursuant to Art. 9.01 *et seq.* of the Texas Election Code. Petition, pp. 39a-43a. This statute vests original and exclusive jurisdiction in the district court to decide election contests, establishes procedures therefor and directs that the court "after a full and fair investigation of the evidence shall decide to which of the contesting parties the office belongs." Texas Election Code, Art. 9.14. Respondent sought and obtained mandatory injunctive relief against petitioner and the state district court proceeding with such suit, and it is from the judgment of the Texas Supreme Court that petitioner seeks review in this Court.

<sup>1</sup> Texas Election Code, Art. 1.03.

Third, shortly after filing his election contest suit in the Texas state court, petitioner filed his "Notice of Contest" with the U.S. House of Representatives pursuant to the Federal Contested Elections Act, 2 U.S.C. §§ 381-396 (1970). On January 19, 1977 respondent filed his answer to such Notice of Contest, moving to dismiss. On February 8, 1977, the House Administration Committee referred petitioner's contest to a three member Ad-Hoc Panel on Contested Elections which conducted a hearing on February 23, 1977. On March 9, 1977 a majority of the Ad-Hoc Panel voted to recommend dismissal of petitioner's contest. Thereafter, on April 28, 1977, the full Committee reported favorably a resolution to dismiss petitioner's contest. The report of the Committee issued May 4, 1977, Report No. 95-243, 95th Cong., 1st Sess., reviews the case and recommends that petitioner's contest be dismissed on the merits.

On May 9, 1977 the matter came before the House of Representatives which, after full debate, adopted the Resolution dismissing petitioner's election contest. See Respondent's Appendix, pp. 1a-14a.

### ARGUMENT

#### I. The Petition Should Be Dismissed for Lack of Jurisdiction

Petitioner invokes the certiorari jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). Respondent submits that review of this case pursuant thereto would be improper because the decision of the Supreme Court of Texas, of which review is sought, rests upon an independent and adequate non-federal ground. *Murdock v. Memphis*, 20 Wall. 590, 636 (1875); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Herb v. Pitcairn*, 324 U.S. 117, 125-6 (1945).

In the Supreme Court of Texas, respondent sought mandatory injunctive relief against the conduct of an election contest suit filed by petitioner under Art. 9.01 of the Texas Election Code. Respondent, the Democratic nominee for Representative from the 22nd Congressional District of Texas, had been the apparent winner at the general election held on November 2, 1976. Petitioner, the Republican nominee, requested a recount as permitted by the Texas Election Code, Art. 7.14, Sec. 19 (for voting machines), Art. 7.15, Subd. 23 (for punch-card ballots), and Art. 9.38a (for paper ballots). Upon conclusion of the recount, respondent was determined to be the winner by 268 votes and on November 22, 1976 was issued a certificate of election by the Secretary of State of Texas.

Dissatisfied with the results of the recount, petitioner instituted an election contest suit under the provisions of Art. 9.01 of the Texas Election Code. Petitioner sought a "judgment" invalidating the certificate of election and "declaring Contestant to be duly elected Congressman from such District for the next term . . . ." See Respondent's Appendix, p. 15a. Although petitioner shortly thereafter filed a contest with the House of Representatives pursuant to the Federal Contested Elections Act, 2 U.S.C. §§ 381-396 (1970), he declined to avail himself of the discovery procedures provided therein. Instead, petitioner instituted extensive discovery pursuant to state procedure as part of his election contest suit in state district court, including an attempt to depose respondent after he was sworn in as Congressman. Respondent thus sought mandamus against the district court and petitioner proceeding with the state court suit.

The Supreme Court of Texas framed the question presented: "The principal question is whether the District Court has jurisdiction over the contest under Art. 9.01 of the Texas Election Code." (Petition, p. 2a) After reviewing the language of the statute, its legislative history, decisions of this Court, and other state courts, the Supreme Court of Texas concluded:

"We hold that Art. 9.01 of the Texas Election Code is *inapplicable* to contests of elections of Members of Congress, and any attempt to apply it to congressional elections would be in violation of Article I, § 5 of the Constitution of the United States." (Petition, p. 9a.) (emphasis supplied).

The Supreme Court of Texas obviously and correctly believed that *if* the Texas statute were construed to be applicable to congressional elections, as petitioner had contended, the statute would be contrary to Art. I, § 5 of the U. S. Constitution. It is nevertheless clear that the court was of the view, and held, as a matter of *state* law, that Art. 9.01 did not authorize a suit such as the one petitioner sought to maintain against respondent. There is an adequate and independent state ground to support the lower court's judgment, which is not reviewable by this Court pursuant to its certiorari jurisdiction. Therefore, the petition for certiorari should be dismissed for lack of jurisdiction.

## II. The Petition Should Be Dismissed for Mootness

As noted above, on May 9, 1977, the House of Representatives passed a Resolution dismissing petitioner's contest filed under the Federal Contested Elections Act, 2 U.S.C. §§ 381-396 (1970). The House has therefore exercised its power under Article I, § 5 of the Constitution consistent with the statutory provisions there-

for in the Contested Elections Act, and hence there is nothing for this Court to review. In *Roudebush v. Hartke*, 405 U.S. 15 (1972),<sup>2</sup> Senator Hartke had been seated by the Senate "without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order." 405 U.S. at 18. Hartke's argument that the case was moot was found insufficient in the face of the Senate's reservation. The Court held that the narrow question before it—"whether an Indiana recount of the votes in the 1970 election is a valid exercise of the State's power under Art. 1, § 4 to prescribe the times, places, and manner of holding elections, or is a forbidden infringement upon the Senate's power under Art. I, § 5"—was appropriate for Supreme Court consideration in view of the Senate's qualified seating of Hartke. The Supreme Court said:

"That question is not moot, because the Senate has postponed making a final determination of who is entitled to the office of Senator, pending the outcome of this lawsuit. Once this case is resolved and the Senate is assured that it has received the final Indiana tally, the Senate will be free to make an unconditional and final judgment under Art. I § 5. Until that judgment is made, this controversy remains alive, and we are obliged to consider it."<sup>3</sup> (405 U.S. at 19).

<sup>2</sup> The Federal Contested Elections Act applies only to contests filed with the House of Representatives. The Act was, therefore, not involved in the *Roudebush* case, which was a Senate contest.

<sup>3</sup> Since "the judgment" in petitioner's contest has been made by the House of Representatives, petitioner's attempt, in footnote 5 of the Petition, to avoid mootness is without merit.

Here, the House has denied petitioner's request for postponement, has received the final Texas tally and has fully considered the contest filed by petitioner challenging respondent's election under the procedures established by the Contested Elections Act. The Committee's Report states:

"In conclusion, therefore, this decision is not based on any technical or procedural defect but on solid substantive defect pursuant to controlling law and consistent with the cases and House precedent." See U.S. House of Representatives, Committee on House Administration, 95th Cong., 1st Sess. Report No. 95-243 (May 4, 1977) at 5.

The House Administration Committee thus reported favorably the resolution of dismissal (H. Res. 526) of petitioner's contest, *on the merits*. After debate, the full House adopted such Resolution dismissing petitioner's contest. The House has thus exercised its constitutional prerogative under Art. I, § 5 and the case is now moot. See Respondent's Appendix A, pp. 1a-14a.

### III. The Decision of the Supreme Court of Texas Is Not in Conflict with *Roudebush v. Hartke*

Should this Court conclude that a reviewable federal question is before it pursuant to its certiorari jurisdiction, 28 U.S.C. § 1257(3), respondent submits that the Supreme Court of Texas was clearly correct in its analysis of the Texas statute in light of this Court's decision in *Roudebush v. Hartke*. *Roudebush* involved Indiana's "recount" statute which is substantially similar to the Texas recount provisions which are not in issue here. Petitioner sought and obtained a full recount under Texas law which confirmed respondent as the winner. The recount statute in Indiana provided

for a judge, upon receipt of a petition, to appoint three commissioners to conduct the recount. Once these appointments are made, the Indiana court has no other responsibilities or powers. This is similar to the procedure followed in a Texas recount pursuant to Arts. 7.14, § 19, 7.15, Subd. 23, and 9.38a of the Texas Election Code, but quite different from those provided by Art. 9.01 *et seq.* for an election contest suit which petitioner filed below.

Contrary to the situation in Indiana, of which the Supreme Court said, "the exercise of these limited responsibilities does not constitute a court proceeding," 405 U.S. at 21, Art. 9.01 of the Texas Election Code provides:

"The District Court shall have original and *exclusive* jurisdiction of all contests of elections, general or special, for all school, municipal, precinct, county, district, state offices, or federal offices, except elections for the offices of Governor, Lieutenant Governor, Comptroller of Public Accounts, Treasurer, Commissioner of the General Land Office, Attorney General, and Members of the Legislature." (Petition, pp. 39a-40a.)

Art. 9.08 says that in such contest the evidence will be confined to issues made by the pleadings and that "as to the admission and exclusion of evidence, the trial shall be conducted under the rules governing proceedings in civil causes." The contestee in such proceeding is required to execute a bond equal to double the amount of the anticipated salaries from the office over the next two years. Failure to file such bond gives the contestant the right to file the bond and take the office regardless of the vote in the election or the state's certificate of election. Arts. 9.09-9.13. Finally, Art.

9.14 provides that "after a full and fair investigation of the evidence [the court] *shall decide to which of the contesting parties the office belongs.*" In his pleadings instituting the contest suit, petitioner sought the relief provided by Art. 9.01: "that . . . a judgment be entered setting aside [respondent's] certificate [of election] and declaring contestant to be duly elected Congressman from the [22nd] District for the next term." So, contrary to the "limited", non-judicial recount involved in *Roudebush*, petitioner sought relief of the kind and nature condemned by *Roudebush*.

In discussing the Indiana statute, the Court in *Roudebush* noted:

"A recount is an integral part of the electoral process and is within the ambit of the broad powers delegated to the states by Article I, § 4. It is true that a State's verification of the accuracy of election results pursuant to its Art. I, § 4, powers is not totally separable from the Senate's power to judge elections and returns. But a recount can be said to 'usurp' the Senate's function only if it frustrates the Senate's ability to make an independent final judgment. A recount does not prevent the Senate from independently evaluating the election any more than the initial count does. The Senate is free to accept or reject the apparent winner in either count, and, if it chooses, to conduct its own recount." 405 U.S. at 25-26.

Texas has a similar recount procedure which petitioner invoked and pursuant to which respondent was confirmed to be the winner. However, the Texas procedure provided by Art. 9.01 *et seq.*, upon which petitioner's state court suit was based, if applied to congressional elections, would clearly purport to "usurp" the House's

powers since the state court is given “exclusive jurisdiction” and “shall decide to which of the contesting parties the office belongs.” This is plainly far different from the non-judicial recount involved in *Roudebush v. Hartke* and would on its face, and pursuant to petitioner’s pleadings, “frustrate” the House’s “ability to make an independent final judgment.”

As we said earlier, the Supreme Court of Texas was quite correct in regarding this unprecedented and clearly unconstitutional power as not within the scope of the Texas statute as a matter of state law. The Court was further correct in its alternative conclusion that if such statute were applied to a congressional election contest, such as the one here, it would be plainly unconstitutional.

**IV. The Decision Below that the Texas Election Contest Statute Is Inapplicable to Federal Congressional Elections Is Consistent with the Rulings of Other Federal and State Courts.**

As stated previously, the Texas election contest statute, as interpreted by the Supreme Court of Texas (see Petition at 7a-8a & n.6, 9a), vests exclusive jurisdiction in the Texas state court to “decide to which of the contesting parties the office belongs.” (Petition at 7a-8a & n.6) The Texas Supreme Court construed the statute as inapplicable to congressional elections, concluding that the determination of which candidate is to be seated in the House or Senate is not the business of the courts of Texas. Thus, the decision is on all fours consistent with the Supreme Court’s statement in *Roudebush v. Hartke*, 405 U.S. 15 (1972). Said the Court in *Roudebush*: “Which candidate is entitled to

be seated in the Senate is, to be sure, a nonjusticiable political question—a question that would not have been the business of this Court even before the Senate acted.” *Id.* at 19 (footnote omitted). See *Powell v. McCormack*, 395 U.S. 486 (1969).

Furthermore the decision below that a state court may not determine which candidate is entitled to be seated in the House is consistent with a long line of federal and state decisions. See *Manion v. Holzman*, 379 F.2d 843, 845 (7th Cir. 1967); *Rogers v. Barnes*, 172 Colo. 550, 474 P.2d 610 (1970); *Burchell v. State Board of Election Commissioners*, 252 Ky. 823, 68 S.W.2d 427 (1934); *Belknap v. Board of Canvassers of Ionia County*, 94 Mich. 516, 54 N.W. 376 (1893); *McLeod v. Kelly*, 304 Mich. 120, 7 N.W. 2d 240 (1942); *In re Williams’ Contest*, 198 Minn. 516, 270 N.W. 586 (1936); *Odegard v. Olson*, 264 Minn. 439, 119 N.W. 2d 717 (1963); *Laralt v. Cannon*, 80 Nev. 588, 397 P.2d 466 (1964); *Smith v. Polk*, 135 Ohio St. 70, 19 N.E.2d 281 (1939).

It should be noted that *Durkin v. Snow*, 403 F.Supp. 18 (D.N.H. 1974), did not, as asserted by petitioner, hold that *Roudebush* permitted state court election contests. The district court upheld a New Hampshire statute which permitted the State Ballot Law Commission to review all rulings of the state Secretary of State on ballots protested “during the recount.” The district court stated, “We are satisfied that the statutory proceedings in progress before the Commission, like the Indiana recount in *Roudebush*, are an integral part of the New Hampshire electoral process and are ‘within the ambit of the broad powers delegated to the

states by Art. I, Sec. 4.' " *Id.* at 19 (footnote omitted) (emphasis supplied).<sup>4</sup> *Lacaze v. Johnson*, 302 So. 2d 613 (La. 1974), cited also by petitioner, is a three-sentence opinion of the Louisiana Supreme Court involving the application of Louisiana's election returns statute, § 18-1193, La. Rev. Stat. (1969). Louisiana's election contest statute, § 18-1251, La. Rev. Stat. (1969), which by its terms does not apply to election contests for congressional elections, was not dealt with in the Louisiana Supreme Court's opinion.

**V. The Decision Below Does Not Improperly Constrict the Ability of the States To Protect Voting Rights in Federal Elections**

The decision by the Texas Supreme Court represents no incursion upon the rights ascribed to the states to set the times, places and manner of holding elections for United States Senators and Representatives under Article 1, Section 4, of the constitution. The Texas Supreme Court has ruled only that if Article 9.01 is applied to congressional elections, the statute would vest a local court with exclusive jurisdiction to determine which candidate is entitled to be seated in the Congress. Thus the decision below, limited as it is, hardly constitutes the "serious incursion into state

<sup>4</sup> The district court determined also that an injunction against state court proceedings would be an unwarranted exercise of its discretion. The court said: "Whether the New Hampshire courts would exceed their constitutional authority were they to order a new election or to order other types of action are, at this time, purely hypothetical questions which cannot be decided apart from consideration of specific orders . . . . The door of the federal court remains open should it be demonstrated that state actions or practices are being pursued which deprived the Senate or any candidate of rights under the federal Constitution." *Id.* at 20.

power, to protect voting rights," as contended by petitioner.

More specifically, the decision does not preclude, as asserted by petitioner, state review of fraud or misconduct. Left standing in "the wake" of the decision below are some 300 pages of Texas election statutes. See J. Patterson, Jr., *Texas Election Laws* (1976-1977 ed.). These laws, for example, authorize the Attorney General of Texas as well as local district and county attorneys to investigate the conduct in any election—primary, general or special—held for any national or state office. These state officials are empowered to investigate the making, canvassing and reporting of the returns. Additionally, the Attorney General and the district and county attorneys are authorized to appear before grand juries and to prosecute *any* violation of the election laws of Texas. The authority of the Attorney General, the local attorneys, and the grand jury is over "any candidate, election official or other person." See Article 9.02, Texas Election Code.

Moreover, petitioner would have the Court believe that the effect of the decision below is to shackle the functioning of a vast array of state statutes providing for contests in congressional elections.<sup>5</sup> Petitioner

<sup>5</sup> "In Texas and elsewhere, the effect of the decision below would be immediate and grave. There would be no state review of fraud or misconduct, regardless of how serious or obvious. State participation in the verification of the election results would be limited to inspection of the ballots themselves. In the entire election process there would be no state review of the acts of local officials, and even obvious and deliberate error could not change the official state declaration of its election results. Until this issue is resolved, candidates will be reluctant to pursue state remedies the sole result of which may be delay, expense, and even forfeiture." Petition at P. 14 (footnotes omitted).

elsewhere in his Petition, however, points only to six states which he contends have contest statutes which are expressly applicable to congressional elections. While petitioner contends that these six contest statutes expressly apply to general elections for congressional seats, closer scrutiny reveals that one of these applies only to the primary election and two are, in essence, recount provisions.<sup>6</sup>

<sup>6</sup> Connecticut provides that any elector or defeated candidate who is "aggrieved by any ruling of the moderator at any election . . . for representative in congress" or who claims "that there was a mistake in the count of the votes cast at such election" may petition the court for a hearing. Indicative of the limited nature of the Connecticut proceeding is the fact that the court must certify its determination to the state secretary "before the 1st Monday after the 2nd Wednesday in December." See Conn. Gen. Stat. Annot. Sec. 9-323.

The Minnesota statute is also a recount provision. Its statute specifies that when the contest relates to federal legislative offices, "the only question to be tried by the court, notwithstanding any other provision of law, shall be the question as to which of the parties to the contest receive the highest number of votes legally cast at the election, and as to whom is entitled to receive the certificate of election." Minn. Stat. Annot. Sec. 209.02 (1976). The Minnesota statute permits the judge to receive evidence related to deliberate, serious and material violations of Minnesota election law but the statute directs that the judge shall make no findings or conclusion thereon but, instead, shall without unnecessary delay, forward all the files and records of the proceedings with all the evidence taken to the presiding officer of the United States Senate or the House of Representatives, as the case may be. See Minn. Stat. Annot. Sec. 209.02 (1976).

Georgia provides for a contest in primary elections; in general elections for federal offices, the statute provides for contests, "except where otherwise prescribed by the Federal or State Constitution". Ga. Code Annot. Sec. 34-1702 (1970).

Pennsylvania's contest statute applies only to "nominations [at primaries]" for congressional offices. By contrast it allows

Petitioner, however, also lists 12 other states as having contests statutes "which apparently" encompass congressional elections. If so, their use must be rare indeed as no decisions are cited which suggest, however, to petitioner's claim of 12 states, that they have been utilized significantly.<sup>7</sup> In con-1975 *Harvard Law Review* study, cited by petitioner, lists not one state as having a contest statute applicable to congressional elections. See *Developments in the Law—Elections*, 88 Harv. Law Rev. 114, 1302-1304, nn. 22, 23, 24 & 25. Indeed the *Review* states,

"Forty-six states and the District of Columbia have enacted statutes providing for contests of some elections. Generally all primary contests are heard by courts, as are general election contests for county and local offices. Contests of the elections of state and federal legislators are decided by the legislatures or United States Congress, and contests of elections of state executive officers are conducted with almost equal frequency in courts and state legislatures." See *Id.* at 1302-1305.

The claim of an undue burden on Congress is unsubstantiated and inaccurate. Petitioner contends that the effect of the decision below is to place an insuperable burden upon the House of Representatives

for contest of both nominations and elections of state senators and representatives. See Pa. State. Annot. Sec. 25-3291 (1963).

Thus, of the six states cited as having contest statutes applicable to general elections for congressional seats, only two have such procedures; if Georgia, with its ambiguously worded statute, is included, the total is three out of 50 states.

<sup>7</sup> Indeed, as the decision below points out (Petition at 6a), there was no reported decision of any prior use of the Texas procedure where a party sought to contest an election for a House or Senate seat.

investigative capacity "which is primarily a legislative body and is ill equipped to undertake a judicial workload of such magnitude." Respondent must ask: What evidence is there of such an insuperable burden. The Library of Congress reports only 78 contest filings in the House of Representatives during a period of 43 years. See Library of Congress, Congressional Research Service, *House Contested Election Cases: March 1933 to 1975* (June 1976). The largest number of contests listed for any congressional session is 17—in the 73rd Congress (March 9, 1933 to June 18, 1934). There were no contests filed, at all, in either the 83rd, 84th or the 93rd congressional sessions and only one contest in the 77th, 79th, 88th and 91st Congresses. Turning to recent congressional sessions, two contests were filed in the 90th Congress, one contest in the 91st, two contests in the 92nd, no contests in the 93rd, five contests in the 94th, see *id.* (table of cases by Congresses), and, as stated previously, there are seven contests in the 95th Congress.

In a word, evidence that the decision below will have a significant impact on the workload of the Congress is considerably underwhelming.

The Federal Contested Elections Act, 2 U.S.C. §§ 381-396 provides an efficient, comprehensive, and equitable procedure for contesting the election of a member of the House of Representatives.<sup>8</sup> It affords the contestant the right to take testimony within 30

<sup>8</sup> Although perhaps not relevant for purposes of this brief, respondent is of the view, as we argued to the court below, that the Federal Contested Elections Act preempts any otherwise applicable state election contest statute and affords the exclusive remedy for a disappointed candidate who wishes to challenge the election results certified by a state.

days after the contestee's answer has been filed, see 2 U.S.C. § 286(c); the Act affords a contestant access to both federal and state courts to obtain subpoenas and provides that the subpoena may also command the production of books, papers, documents or other tangible things, see 2 U.S.C. § 388(a) & (e). Moreover, the Act provides the contestant with a hearing before the Committee on House Administration on the papers, depositions and exhibits that he has filed with the clerk. The Act allocates the decision-making to the United States Congress, where it belongs, but provides for the utilization of local courts in the evidence-gathering process. Respondent submits that the Act represents an appropriate allocation between federal and state governments and accords with the standard set forth in the Constitution that "each House shall be the judge of the elections, returns and qualifications of its own members." Art. 1, § 5, U.S. Const.

### CONCLUSION

Wherefore, respondent respectfully prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

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## **APPENDIX**

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## APPENDIX A

CONGRESSIONAL RECORD—HOUSE, pp. H4184-H4187 (MAY 9, 1977)

**Dismissing the Election Contest Against Bob Gammage**

Mr. THOMPSON. Mr. Speaker, by direction of the Committee on House Administration, I call up a privileged resolution (H. Res. 526) and ask for its immediate consideration.

The Clerk read the resolution as follows:

H. RES. 526

RESOLVED, That the election contest of Ron Paul, contestant, against Bob Gammage, contestee, Twenty-second Congressional District of the State of Texas, be dismissed.

The SPEAKER pro tempore. The gentleman from New Jersey (Mr. THOMPSON) is recognized for 1 hour.

Mr. THOMPSON. Mr. Speaker, this resolution deals with the contested election case of Paul against Gammage. The ad hoc committee investigating this case was chaired by the gentleman from Pennsylvania (Mr. AMMERMAN) and consisted of the gentleman from Michigan (Mr. NEDZI) and the gentleman from California (Mr. WIGGINS).

Mr. THOMPSON. Mr. Speaker, I yield such time as he may consume, for debate only, to the gentleman from Pennsylvania (Mr. AMMERMAN), the panel chairman.

(Mr. AMMERMAN asked and was given permission to revise and extend his remarks.)

Mr. AMMERMAN. Mr. Speaker, the subject of House Resolution 526, for which I now rise, is the contested election case of Paul against GAMMAGE arising out of the general election of November 2, 1976, for a seat in the 59th Congress from the 22d district of Texas. I will briefly sum-

marize events which have taken place from the date of the general election, November 2, 1976, up to this moment.

The result of the November 2, 1976, general election involving Mr. GAMMAGE and Mr. Paul showed a difference of 236 votes in Mr. GAMMAGE's favor.

Mr. Paul requested and obtained a full recount pursuant to Texas law which resulted in a difference of 268 votes in Mr. GAMMAGE's favor.

The recount was conducted under the general observation of inspectors from the secretary of state of Texas and by counsel from the House Administration Committee. Accordingly, on November 22, 1976, BOB GAMMAGE received a certificate of election from the secretary of state of Texas. Mr. GAMMAGE was duly sworn, without objection, as a member of the 95th Congress on January 4, 1977.

Mr. Paul filed an election contest in the State district court of Harris County, Tex., pursuant to Texas law. Mr. GAMMAGE responded with a motion to dismiss and State court litigation was joined.

On December 19, 1976, contestant Paul filed a notice of contest with the U.S. House of Representatives pursuant to the Federal Contested Election Act. The matter was referred to the Committee on House Administration and on January 19, 1977, contestee GAMMAGE filed an answer and motion to dismiss.

During this period, Chairman FRANK THOMPSON, Jr., appointed me to chair a contested election panel to deal with this matter. Also serving on that panel are LUCIEN NEDZI and CHARLES WIGGINS.

On February 23, 1977, the panel conducted an open hearing for the purpose of hearing oral arguments from both sides pertaining to three motions:

First. A motion by contestant Paul requesting that the House stay all proceedings pending the outcome of court proceedings in Texas.

Second. A motion by contestant Paul requesting 30 additional days for taking depositions.

Third. A motion by contestee GAMMAGE for a dismissal of the case. Arguments were heard and taken under advisement. The record was held open for postsubmission briefs.

One week after the panel hearing, on March 2, 1977, the Supreme Court of Texas ruled that the provisions of Texas law under which contestant Paul had brought his State court contest, as it applied to Federal offices "is in diametrical conflict with and contrary to article I, section 5 of the U.S. Constitution."

The State court cases were thereby terminated and the question of staying House proceedings was moot.

On March 9, 1977, again 1 week later, the panel met in an open hearing for the purpose of discussing the evidence presented. Pursuant to a motion made by Chairman AMMERMAN, the panel voted 2 to 1 to recommend to the full Committee on House Administration that contestee GAMMAGE's motion to dismiss be granted.

On April 28, 1977, at a full committee meeting, the Committee on House Administration voted 16 to 6 to adopt House Resolution 526:

*Resolved*, That the election contest on Ron Paul, contestant, against BOB GAMMAGE, contestee, 22d Congressional District of the State of Texas, be dismissed.

That is the resolution before the House this afternoon.

Mr. Speaker, a contest for a seat in the House is a matter of the most serious import. The House underlined its concern when it passed, in 1969, the Contested Election Act.

The thrust of the legislative history and first House cases interpreting the contested election law can be summarized simply:

The contestant must, at the outset make allegations with sufficient supportive evidence to justify his claim

to the seat. In other words, Mr. Speaker, the contestant must come forward with sufficient evidence, which if substantiated, would show he would have won the election.

Mere allegations or statements by one's campaign workers do not meet the high standard of supportive evidence that must be offered before a contestant is entitled to go forward.

The dissenting views object because an evidentiary burden is placed on contestant Paul. However, Mr. Speaker and my fellow colleagues, that is only proper: The contested election law does not purport to allow losing candidates to go on fishing expeditions. Indeed, had the committee permitted, Mr. Paul might have attempted to depose every voter in the 22d district.

Mr. Speaker, Ron Paul had his "days in court." This committee allowed him ample opportunity to argue his case and present supportive and credible evidence that would show his entitlement to this seat in Congress.

He argued at length, but failed to present evidence to support his claim to this seat.

Mr. Speaker, I urge the adoption of House Resolution 526.

Mr. THOMPSON. Mr. Speaker, before yielding to the distinguished gentleman from California, I am constrained to say with considerable pride that in this instance and in the preceding one, the wisdom of setting up bipartisan panels, including bipartisan staff and bipartisan investigators, is vindicated by the splendid work done by the gentleman from Pennsylvania (Mr. AMMERMAN) and the gentleman from New Jersey (Mr. MINISH), as well as the two panel chairmen to follow. The gentleman from Pennsylvania (Mr. AMMERMAN) has been a U.S. attorney for western Pennsylvania, and has had extensive experience as a prose-

cutor, as a lawyer, and certainly has given evidence of a splendid knowledge of law in this instance.

Mr. Speaker, for purposes of debate only, I yield 5 minutes to the gentleman from California (Mr. WIGGINS), a distinguished constitutional lawyer second only to the gentleman from Texas (Mr. ECKHARDT).

Mr. WIGGINS. Mr. Speaker, I thank the gentleman for yielding to me. I object to the resolution, and will urge my colleagues to vote against it, but I assure the gentleman that my objections are not based upon any constitutional argument.

Ladies and gentlemen, we are in the process of adopting a totally improper procedure for the consideration of election contests, and it is important that we correct it now. It has nothing to do with the merits of Mr. Paul's case or the case that will follow. It is important, however, that whatever the merits may be, we adopt a procedure providing for the orderly, fair disposition of election contests.

Let me explain very briefly, ladies and gentlemen, what our statute provides. The new contested election statute enacted by this House provides that a contest will be commenced by the filing of a document known as a notice of contest. This is something akin to a complaint. It is a pleading which initiates the process.

That pleading, the notice of contest, must be filed within 30 days following the certification of the results of an election by the appropriate State election officers. In this case, there is no challenge at all to the fact that Mr. Paul filed an appropriate notice of contest within the time provided by law.

The next section of our election contest statute says what the contestee must do when served with a notice of contest. The statute says that the contestee may do one of two things: He may either file an answer within 30 days of service of the notice of contest, in which answer the con-

testee admits, denies or otherwise answers the complaint; or, alternatively, the contestee may raise certain motions by way of defense.

Those motions include a statement that the complaint, that is, the notice, is so ambiguous that it is impossible to frame an answer to it. We understand such a motion. It is addressed to the sufficiency of the pleading. The statute also provides that a contestee may, by way of motion, complain that the notice of contest fails to state with particularity the grounds upon which the contest is founded or that it would change the result of the election. Such a motion is also addressed to the pleadings.

Bear in mind that the burden on the maker of that motion is to "state," only to allege, the basis of the contest.

The statute goes on to provide a method of collecting evidence in support of a well-pleaded notice of contest. The statute says that 30 days after this answer comes in, the contestant may start collecting his evidence by way of noticing depositions, obtaining affidavits, or entering into stipulations.

That is the technique envisioned in the law for the proof of allegations contained in a notice of contest.

That is the process, I say to the Members. Let me tell the Members what is wrong with our treatment of that process.

We are authorizing the contestee to file a motion to dismiss any time after the filing of the notice of contest. When that motion to dismiss is filed, the majority says that there is a burden cast upon the contestant. He is a respondent to the motion. The immediate burden is cast on the respondent of the motion to come forward and prove the case at that time, even though the time for taking depositions and the collection of evidence has not yet run.

There is an analogy in Federal civil practice.

It is clear that the maker of a motion to dismiss is asking for a disposition of the case on the merits. He is not challenging the pleadings. It is not in the nature of a demurrer.

In that respect, the motion to dismiss is very much like a motion for summary judgment.

There are enough attorneys in this Chamber right now to know that the maker of a motion for summary judgment carries a very heavy burden of proof.

The SPEAKER pro tempore. The time of the gentleman from California (Mr. WIGGINS) has expired.

Mr. THOMPSON. Mr. Speaker, I yield 5 additional minutes for the purpose of debate only to the gentleman from California (Mr. WIGGINS).

Mr. WIGGINS. Mr. Speaker, as I just said, this motion to dismiss is very much like a motion for summary judgment. When confronted with a motion for summary judgment in civil litigation, the responding party does not carry the burden, nor should he. The maker of the motion carries the burden. And he must show that there are no issues of fact justifying going to the jury, and he must show that he is entitled to judgment as a matter of law. The responding party need not prove his case to defeat the motion.

He must merely show credible questions of fact which justify going forward.

Mr. Speaker, we are now abandoning all those lessons, and we are saying that the making of motion to dismiss immediately after a notice of contest casts upon the respondent the duty of proving his case right then in response to the motion, even though the effect of granting the motion, as in this case, is to cut off the opportunity of taking depositions, which is the technique envisioned in the statute for collecting the evidence.

Let me suggest a proper disposition of this matter. Clearly this resolution ought to go back to the committee

so that the contestant can go forward with his attempt to prove his case, as envisioned by the statute. I have no idea whether he is going to prove it or not. He has undertaken a pretty tough case to prove, and it may be that he cannot prove it. But surely he should have the chance to do so, and he should not be cut off.

The proper disposition of the pending resolution is to recommit that resolution to the Committee on House Administration so that the contestant will have a chance to prove his case. If in fact he cannot do so, of course, we will dispose of his contest quickly, but under no circumstances should we right now on this floor ratify a procedure which denies to a contestant the opportunity of proving his case.

In conclusion, Mr. Speaker, it might be alleged that Mr. Paul had that chance. After all, the statute gives him 30 days within which to take depositions. But the statute also says that he may extend that time for good cause, and within 30 days Mr. Paul through his attorney came forward and made a formal request to extend time.

Our committee did not even reach that motion. It elected to dismiss it on the merits and with prejudice because the contestee filed a notice to dismiss.

We cannot tolerate this procedure. We cannot tolerate it in the future. There are going to be other contests by Republicans and Democrats, so let us not look at this as a partisan issue. This question will come up again in the future. If we do anything today, let us establish a precedent, a precedent that will provide for the fair disposition of all election contests according to the election contest statute. Let us not emasculate that statute as is suggested by the majority.

Mr. Speaker, I urge a "no" vote on the resolution. I urge an "ayes" vote on the motion to recommit which will be made.

[Mr. THOMPSON addressed the House. His remarks will appear hereafter in the Extensions of Remarks.]

Mr. Speaker, I yield 4 minutes to the gentleman from Michigan (Mr. NEDZI).

(Mr. NEDZI asked and was given permission to revise and extend his remarks.)

Mr. NEDZI. Mr. Speaker, I thank the gentleman from New Jersey (Mr. THOMPSON) for yielding me this time.

Mr. Speaker, I was very pleased to hear the gentleman from California (Mr. WIGGINS) say that this is not a partisan issue. I think the Members on our side have demonstrated that it is not a partisan issue because we voted across the board in all four of these contests. We disallowed them basically because evidence was not presented to our committee which warranted that kind of response upholding any of the contests.

Mr. Speaker, the issue is a pretty simple one which I think each of us is going to have to resolve in his own mind. The gentleman from California (Mr. WIGGINS) has taken one approach to the statute. I along with my colleagues on this side of the aisle, have taken another approach which I think is the more reasonable one.

The question is whether we are going to insist upon all of the fine legalisms of procedure that exist in a court of law in these election contests which are, as all of us know, fraught with political pitfalls and political temptations.

This is the problem, Mr. Speaker. It is not a partisan issue.

I think that in many cases if we go the route of allowing these legal procedures to tie up the Committee on House Administration and the House of Representatives to a point where we cannot resolve these election contests expeditiously, we are going to find that in each of the congressional districts anyone who thinks that he has a good

shot as whoever is pronounced the winner of an election, during the next election will engage in an election contest. He will come in and have a forum which will enable him to get a leg up as far as the next election is concerned. The issue will not be resolved within that period of time.

Therefore, Mr. Speaker, the question is whether we are going to seek to resolve these issues expeditiously where evidence has not been presented to the panel with any degree of sufficiency, or whether we are going to insist on permitting these people to go on fishing expeditions.

There is an historical presumption that the certificate of election is valid; and unless that is refuted with adequate evidence, we certainly should stick to that presumption.

Mr. MAHON. Mr. Speaker, will the gentleman yield?

Mr. NEDZI. I yield to the gentleman from Texas.

Mr. MAHON. Mr. Speaker, I concur in the remarks of the gentleman from Michigan (Mr. NEDZI). The Committee on House Administration has now investigated this matter and is satisfied that Mr. GAMMAGE received the majority of the votes in the election and that in the recount he continued to receive a majority of the votes. He was certified by the secretary of state of Texas as having been elected to the Congress from the 22d District. Any close election always raises questions, but it seems to me this now should not be a partisan matter and that the proper action of the House is to approve the recommendation of the Committee on House Administration so that the people of the 22d District of Texas can be represented.

I urge the House to defeat the motion to recommit and to approve the recommendation of the committee.

Mr. THOMPSON. Mr. Speaker, I yield 2 minutes to the gentleman from Texas (Mr. ARCHER), for purposes of debate only.

(Mr. ARCHER asked and was given permission to revise and extend his remarks.)

[Mr. ARCHER addressed the House. His remarks will appear hereafter in the Extensions of Remarks.]

Mr. THOMPSON. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I cannot leave unanswered the remarks of the gentleman from Texas (Mr. ARCHER). To say that there is still doubt may be a valid claim in his mind. It is not in the judgment of the committee.

To say that there has been a denial of justice by the Committee on House Administration is an absolute and complete untruth and is deeply resented.

I refuse to yield.

To say that we should yield this matter to the Supreme Court of Texas is to say to the Supreme Court of Texas, notwithstanding the 5-to-4 vote that, no, you are wrong, we throw it back to you.

To say that we have not considered motives, to say that we have been unfair, is an absolute insult to the members of the Committee on House Administration and I do not intend to let it go unanswered.

I deeply regret having to say this to the gentleman.

The gentleman from California (Mr. WIGGINS) has not accused us of evil motives. He bases his case on legal theory. The gentleman from Texas may make such judgments as he wants on the Americanism of anybody—whatever that is, whether it be love of mother, or apple pie, or Texas, or whatever. He can have his definition. I have wondered for years at the definition of a great American. I have heard a great many described as great Americans whom I would not describe as such, but I have not taken their definition.

Mr. Speaker, I yield briefly to the gentleman from California (Mr. WIGGINS) for the purpose of debate only.

Mr. WIGGINS. Mr. Speaker, I did not at all understand the gentleman from Texas (Mr. ARCHER) to impugn in any way the motives and the integrity of the members of the committee on which we both serve but, nevertheless, I fully share the views of the gentleman from Texas that justice has been denied in this case because the committee is approving a procedure which prevents one of the parties from going forward to prove his case. That is a fair observation and I hope the gentleman from New Jersey does not take it personally.

Mr. THOMPSON. Mr. Speaker, if the gentleman will yield, we have adhered strictly to the standards set forth in the statute. I concede to the gentleman that it can be bad but I deny that there was any justice denied in this case.

Mr. WIGGINS. Indeed, the words "motion to dismiss" do not appear anywhere in this statute. This is not a statutory motion. Rather it calls upon the inherent authority of the committee to dismiss a frivolous petition on a good showing. Strangely, we require the respondent to prove his case in order to resist the motion. That is not right, my colleagues, and I do not believe that that is what justice is all about. This emasculates the statute. I urge the Members to read it, it is all in title 2, section 382.

Mr. THOMPSON. Mr. Speaker, I yield 2 minutes, for debate only, to the gentleman from California (Mr. JOHN L. BURTON).

(Mr. JOHN L. BURTON asked and was given permission to revise and extend his remarks.)

Mr. JOHN L. BURTON, Mr. Speaker, later on there is another contest Pierce against PURSELL, that is a very close election that will forever be in doubt in the minds of many people, including the member of the Democratic Party whose motion was dismissed by majority members of the House Administrative Committee he was denied any means of pursuing his action, which was merely a recount, because

there is no provision available. We did it consistent with the laws and the procedures of this House and the Committee on House Administration. That election will also forever be in doubt in the mind of the Democrat who ran for office.

I would say to my colleagues on this side of the aisle I will wonder if we did the right thing if this all becomes a partisan basis in the view that elections will forever be in doubt, because we do not have a procedure—and I would like to see one—for recount. But we were struck with the fact that under the laws and under our precedents there is no procedure except to call them as we see them, and that is how we did it, fairly and squarely. I do not see anybody raising that issue on the Pierce against PURSELL matter.

Mr. THOMPSON. Mr. Speaker, I yield such time as he may consume to the gentleman from Pennsylvania (Mr. AMMERMAN).

(Mr. AMMERMAN asked and was given permission to revise and extend his remarks.)

[Mr. AMMERMAN addressed the House. His remarks will appear hereafter in the Extensions of Remarks.]

Mr. THOMPSON. Mr. Speaker, I move the previous question on the resolution.

The previous question was ordered.

Motion to recommit offered by Mr. Wiggins

Mr. WIGGINS. Mr. Speaker, I offer a motion to recommit.

THE SPEAKER pro tempore. Is the gentleman opposed to the resolution?

Mr. WIGGINS. I am, Mr. Speaker.

THE SPEAKER pro tempore. The Clerk will report the motion to recommit.

The Clerk read as follows:

Mr. Wigigns moves to recommit the resolution H. Res. 526, to the Committee on House Administration.

The SPEAKER pro tempore. Without objection, the previous question is ordered on the motion to recommit.

There was no objection.

The SPEAKER pro tempore. The question is on the motion to recommit.

The question was taken; and the Speaker pro tempore announced that the noes appeared to have it.

Mr. WIGGINS. Mr. Speaker, I object to the vote on the ground that a question is not present and make the point of order that a quorum is not present.

The SPEAKER pro tempore. Evidently a quorum is not present.

The Sergeant at Arms will notify absent Members.

The vote was taken by electronic device, and there were—yeas 126, nays 260, answered “present” 2, not voting 44, as follows:

\* \* \*

So the motion to recommit was rejected.

The result of the vote was announced as above recorded.

The SPEAKER pro tempore. The question is on the resolution.

The question was taken; and the SPEAKER pro tempore announced that the ayes appeared to have it.

Mr. WIGGINS. Mr. Speaker, on that I demand the yeas and nays.

The yeas and nays were refused.

So the resolution was agreed to.

A motion to reconsider was laid on the table.

# APPENDIX B

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS  
151st JUDICIAL DISTRICT

No. 1,103,064

RON PAUL, *Contestant*

vs.

ROBERT ALTON GAMMAGE, *Contestee*

## Contestant's First Amended Petition

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES RON PAUL, Contestant, complaining of Robert Alton Gammage, Contestee, and for cause of action shows:

\* \* \*

WHEREFORE, PREMISES CONSIDERED, Contestant prays that such notice as is required in such cases be given to Contestee, and that on hearing hereof a judgment be entered setting aside the certificate and result of said election and declaring Contestant to be duly elected Congressman from such District for the next term; in the alternative, and on the alternative grounds stated above, Contestant prays that an order be entered that the election held on November 2, 1976, insofar as it pertains to the office of Representative from the 22nd Congressional District should be in all things set aside and held to be invalid, and that this Court enter its order and mandatory injunction directed to the election officials within such District commanding them to give notice of and conduct a special election for such office. Contestant prays for such other and further relief as he may show himself entitled at law or in equity. Contestant further prays for an order of impoundment as above set out.

Respectfully submitted,

/s/ FITZHUGH H. PANNILL, JR.  
Fitzhugh H. Pannill, Jr.

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